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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

MELODY JO SAMUELSON, Plaintiff and Respondent, v. DEPARTMENT OF STATE HOSPITALS et al., Defendants and Respondents.	A141659 (Napa County Super. Ct. No. 2657631)

Plaintiff Melody Jo Samuelson, who worked as a psychologist at Napa State Hospital, filed suit against the Department of State Hospitals and three state-employed psychologists, claiming that she was retaliated against after disclosing that the hospital was not properly conducting competency assessments on criminal defendants who had been found incompetent to stand trial, and that the hospital's peer review discipline process was being used coercively and in violation of the hospital's own bylaws. Samuelson sued under two of California's "whistleblower" protection statutes: Labor Code section 1102.5, which prohibits an employer from retaliating against an employee who has reasonable cause to believe she is disclosing a legal violation; and Government Code section 8547.8, which protects a state employee from retaliation for making a protected disclosure about improper governmental activity. A jury agreed with Samuelson, found all of the defendants liable, and awarded her a total of $1 million in damages, including $695,000 for "lost income capacity."

Defendants appeal the judgment on several grounds. First, they argue that the evidence was insufficient to establish that Samuelson made a protected disclosure under the whistleblower statutes. They further argue that the trial court committed prejudicial error by admitting evidence of a federal consent decree against the hospital, instructing the jury on irrelevant sections of the Health and Safety Code, and allowing Samuelson to contend in closing argument that her criticism of competency assessment methods disclosed a constitutional violation. As to damages, defendants argue that there was insufficient evidence to support any award for damages based on lost income capacity, since it was premised on speculative testimony about earnings Samuelson would have made from a private psychology practice that she never opened.

We agree that the $695,000 awarded for lost income capacity was not supported by substantial evidence. We reject defendants' remaining arguments and will affirm the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

The Parties

Plaintiff Melody Jo Samuelson was hired by the Department of State Hospitals-Napa (Napa State Hospital or NSH) in June 2006, approximately one year after she received a doctoral degree in psychology.[1]

Defendant Jim Jones was a psychologist at NSH who served as chief of psychology from December 2005 until November 2010. He left NSH in 2012. Defendant Nami Kim is a psychologist at NSH who supervised Samuelson beginning in 2008. Defendant Deborah White is a psychologist who began work at NSH in 2007 and who, in April 2008, was assigned to serve as Samuelson's forensic assessment proctor.

[1] As we explain below, the sufficiency of the evidence standard applies to most of defendants' arguments on appeal. As such, "we recite the facts in the light most favorable to the prevailing party, giving that party the benefit of every reasonable inference, and resolving conflicts in support of the judgment." (*Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 747 (*Greenwich*).)

The Federal Consent Decree

In May 2006, the United States Department of Justice and the State of California entered into a consent decree stemming from the federal government's investigation of alleged civil rights abuses at four California State Hospitals, including NSH. The consent decree required that "[e]ach State Hospital shall develop and implement standard psychological assessment protocols, consistent with generally accepted professional standards of care." To facilitate compliance with the consent decree, NSH and the other state hospitals created an "enhancement plan." NSH conducted a baseline evaluation of itself against the enhancement plan, and a federal court monitoring team was responsible for assessing the hospital against its baseline evaluations.

Program 5 and Competency Assessments

When Samuelson first started working at NSH in 2006, she was assigned to NSH's "Program 5," which is the unit tasked with restoring the competency of defendants who have been declared incompetent to stand trial by a court. Samuelson's responsibilities included conducting trial competency assessments of patients previously found incompetent to stand trial; she was part of an interdisciplinary team that typically included a psychiatrist, psychologist, rehabilitation therapist, social worker, registered nurse, and primary psychiatric technician.

The trial competency assessments performed in Program 5 were conducted pursuant to Penal Code statutes addressing defendants found incompetent to stand trial. A defendant is considered mentally incompetent "if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." (Pen. Code, § 1367, subd. (a).) A defendant found incompetent to stand trial under this standard is ordered by the court to be delivered to a state hospital, such as NSH, to promote the defendant's speedy restoration to mental competence. (Pen. Code, § 1370, subd. (a)(1)(B)(i).) The hospital is required to periodically report to the court regarding the status of a patient's competency. If the hospital reports to the court that a patient has

been restored to competency, the patient is returned to the committing court so it can rule on the defendant's competency.

Methods for Assessing Competency

From the time Samuelson started at NSH in 2006, three assessment instruments were used to assess competency: the Revised Competency Assessment Instrument (also known as the R-CAI test), the "mock trial," and "dispositional staffing." NSH gave patients a trial competency workbook that described these tests. NSH used a competency assessment instrument other than these three tests in just one percent of its cases.

The R-CAI is a list of approximately 14 questions. This was the test used the vast majority of the time by Program 5 personnel when they conducted trial competency assessments. The test includes questions about the patient's name, age, and birthday. It also includes basic questions about court proceedings, such as asking a patient to identify the charges against him, the name of his attorney, and the roles of the judge, jury, and other court officers in a legal proceeding. While another test, the MacArthur test, allows hospital staff to do a "deeper probe" that analyzes a patient's "rational understanding" of the proceedings against him, the R-CAI tests only factual understanding. If a patient answers a question incorrectly, the person administering the R-CAI tells the patient the correct answer.

The "mock trial" is a simulated court proceeding conducted with scripts that is intended to replicate a courtroom proceeding. It takes place in Program 5's mock courtroom, which has places for a jury, defendant, judge, attorneys, and a court clerk to sit. Patients observe the mock proceeding, accompanied by members of the interdisciplinary team responsible for assessing competency. During the proceeding, patients are asked the same questions that are in the R-CAI test, such as whether the patient knows the charges against him and the plea options.

"Dispositional staffing" refers to a conference where members of the interdisciplinary team discuss the results of the mock trial assessment, as well as all information the team had about a patient leading up to the mock trial.

Samuelson's Complaints about Competency Assessment Methods

In the fall of 2006, Samuelson began to complain about the manner in which trial competency assessments were being conducted at NSH. Specifically, she believed that patients were rote memorizing the answers to the standard R-CAI questions, and NSH personnel were administering the test without asking follow-up questions in addition to the standard questions. She believed this was an improper way to use the R-CAI test that violated the applicable standard of care.

Samuelson directed her complaints to several people at NSH. She complained to defendant Jones, then the chief of psychology. She expressed her concerns to Dr. Anne Hoff, a neuropsychologist who served as Samuelson's licensure supervisor and proctor for neuropsychological privileges. Samuelson informed two psychiatrists, Dr. Ahmed Haggag and Dr. Patricia Tyler. She also raised her complaints in a program meeting attended by several members of Program 5, including Ellen Bachman, who served as director of Program 5 and had management responsibility for the program. The program meeting was also attended by Dr. Jack Dawson, who proctored Samuelson for general psychological privileges.

Samuelson continued to complain about how trial competency assessments were performed into 2008. She made complaints to Dr. Tyler, who at the time served as NSH medical director, and complained to members of the federal court monitoring team overseeing the consent decree enhancement plan. Samuelson continued to voice concerns to Dr. Jones, as well. In response, Dr. Jones said that he understood that patients were rote memorizing answers to R-CAI questions, but that he did not consider rote memorization to be a problem. Samuelson then complained about Dr. Jones's handling of trial competency procedures to members of the treatment team.

Samuelson's Reassignment to Program 3

After Samuelson complained about Dr. Jones, Samuelson observed that he began acting less friendly toward her. Dr. Jones then reassigned Samuelson to another unit at NSH, Program 3, where Samuelson conducted violence risk assessments of patients who had been found not guilty by reason of insanity or who were mentally disordered

offenders, to determine if they were a low enough risk to be released back into the community. No one told Samuelson why she was reassigned to Program 3.

Defendant Kim was Samuelson's supervisor in Program 3. The two had a dispute about how to complete a form describing the assessments that had been performed on patients. Dr. Kim believed that the form should be left blank with regard to whether there were any assessments that had not been performed on patients. Samuelson believed the way Dr. Kim wanted to use the form "misrepresent[ed] what is being done" to the patient. After the dispute, Samuelson noticed Dr. Kim began acting very cold toward her.

Patient A's Case

Beginning in 2006, Samuelson treated a patient, "Patient A," who had been charged with murder but found incompetent to stand trial. Samuelson conducted a series of tests on Patient A in the spring of 2007 and concluded he continued to be incompetent to stand trial. She also concluded that it was unlikely that Patient A could be restored to competency because he was delusional and would not be able to assist his attorney in any meaningful way. Samuelson signed a letter in March 2007 certifying to the trial court that Patient A was not competent.

In the Spring of 2008, Samuelson was contacted by Patient A's attorney, who informed Samuelson that a subsequent treatment team had concluded that Patient A was competent to stand trial. Samuelson was surprised by this conclusion. Patient A's attorney subpoenaed Samuelson to testify at a hearing to determine whether Patient A had been restored to competency. Samuelson testified that she was qualified to call herself a psychologist and neuropsychologist "in the field," but that she was not licensed. While acknowledging she had not seen Patient A in over a year, Samuelson testified that her prognosis was that Patient A was unlikely to be restored to competency. The court found Samuelson's testimony "reflected a bias" and ruled that Patient A was competent to stand trial.[2]

[2] In his ruling, the trial judge in Patient A's case said the following about Samuelson's testimony: "I was particularly unimpressed by the lady psychologist from

Samuelson's Reassignment and First Peer Review Proceeding

Following the competency hearing in Patient A's case, the deputy district attorney prosecuting Patient A, Paul Graves, complained to NSH about Samuelson's testimony and suggested someone at the hospital should review a transcript of her testimony. Graves believed that Samuelson's testimony was "slanted or biased in favor of Patient A," and that she acted as if she had a "mother and a son type relationship" with Patient A and was "very protective of him." Graves also felt that there were "some points in [Samuelson's] testimony that were very clear where she had either [mis-scored] something or messed something up or done something wrong, and she couldn't admit it; instead, she talked in circles."

In December 2008, defendant Jones reviewed a copy of the transcript from Patient A's competency hearing and met with Samuelson to ask questions about her testimony. Dr. Jones then prepared a memorandum directed to Samuelson expressing several concerns; he believed Samuelson misrepresented herself as a neuropsychologist during the hearing, improperly advised Patient A on "legal maneuvers," appeared to practice beyond the scope of her professional ability, and failed to protect confidential information. Jones also questioned Samuelson's credibility as a witness because she previously made statements about Patient A's case to Dr. Jones that were inconsistent with court records.

In January 2009, Samuelson received a notice of temporary reassignment to the psychology department at NSH. She was prohibited from entering the secure treatment area of the hospital and contacting patients without prior approval from supervisors. Because Samuelson was prohibited from having any contact with hospital patients, she believed that the reassignment essentially suspended her hospital privileges.

Also in January 2009, Dr. Jones initiated peer review proceedings against Samuelson by sending a memorandum to the chair of the psychology peer review panel at

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Napa State Hopsital," and that "[i]n my view her testimony reflected a bias that substantially undercut the value of her testimony."

NSH. In April 2009, Samuelson received a letter stating that a peer review committee had concluded that Samuelson violated various "ethical principles" and recommended that her employment be terminated through a stipulated resignation. The letter did not tell Samuelson in what manner she had violated ethical principles.

Samuelson appealed the peer review findings and recommendations. After requesting the appeal, Samuelson read NSH's bylaws and concluded that the peer review proceedings had not been conducted in accordance with the bylaws, which required that all complaints be forwarded to the hospital chief of staff; that an employee under peer review have the opportunity to interview with the peer review panel; and that all deliberations of the peer review panel be kept confidential. Samuelson believed none of these provisions had been followed. She wrote a letter to NSH's chief of staff explaining that the bylaws had been violated. In response, the chief of staff terminated the peer review proceedings brought against Samuelson and dismissed the findings and conclusions of the peer review panel.

Negative Reports in Samuelson's File

In May 2009, Samuelson discovered that defendant White, her former proctor, had prepared four proctor reports allegedly dated as written in 2008 and earlier in 2009 containing negative comments about her work. In the first report, Dr. White criticized Samuelson's ability to conduct violence and competency assessments, and concluded that "it is my regretful but firm opinion that [Samuelson] has not demonstrated an adequate level of competency, even when proctored in forensic psychology." In the second report, Dr. White blamed Samuelson when a patient attempted to injure herself because there was a "significant delay" in Samuelson completing a violence risk assessment of the patient. The final two reports contained negative remarks about whether Samuelson should receive forensic assessment privileges.[3]

[3] Samuelson asserted at trial that all of these reports were prepared in February 2009 and backdated to show earlier dates, and she presented testimony from an electronic documents expert. Defendants do not dispute on appeal that these documents were created in February 2009 and backdated.

Also in May 2009, Samuelson discovered additional comments in her credentials file made by defendant Kim. Dr. Kim's comments essentially repeated the allegations made against Samuelson in the peer review complaint, and also mentioned the possibility of putting Samuelson's application for privileges on hold pending disciplinary action.

Second Peer Review Proceeding

In September 2009, Samuelson received notice that defendant Jones initiated a second peer review proceeding against Samuelson to reinvestigate the original complaint made against her. Two months later, a peer review subcommittee concluded its investigation and declined to issue any findings. The subcommittee issued a report stating it believed it could not be "objective" in its investigation because the subcommittee members and Samuelson shared the same supervisors, namely Dr. Jones and Dr. Kim. The subcommittee recommended that the matter be reviewed by an outside agency.

The Special Investigation, and Samuelson's Termination and Reinstatement

In June 2009, separate from the peer review proceedings, Dr. Jones sent a memorandum to the special investigator's office of NSH requesting that Samuelson be investigated for committing perjury during her testimony at Patient A's competency hearing. In April 2010, the special investigator assigned to the matter, Officer Jesus Gallegos of the hospital's special investigator's office, issued a report concluding that Samuelson had misrepresented her training, experience, and education.

In July 2010, Samuelson received a notice that she would be terminated from her employment with NSH effective August 9, 2010. The "notice of adverse action" that listed several grounds for her termination. First, the notice stated that Samuelson was "argumentative and critical" in a conversation she had with another psychologist, Dr. Amrita Narayanan, about the decision to return Patient A to court as competent, when Samuelson had not worked on Patient A's case for over a year. Second, the notice faulted Samuelson for expressing her belief to Dr. Narayanan that Patient A could never be competent and that Patient A "was going to be railroaded into the death penalty." Last, the notice stated that Samuelson "falsely testified under oath" at Patient A's

competency hearing by saying she was recognized and qualified to testify as a neuropsychologist, and that she had forensic privileges.

Samuelson appealed her termination to the State Personnel Board (SPB), which held hearings in January and March of 2011. In a lengthy written decision, the SPB revoked Samuelson's dismissal. The SPB struck the allegations in the notice of adverse action regarding Samuelson's conversations with Dr. Narayanan and Dr. Jones because the Department of State Hospitals failed to produce evidence about whether Samuelson acted inappropriately or was untruthful in either of those conversations. The SPB determined that the Department of State Hospitals failed to show by a preponderance of the evidence that Samuelson testified falsely at Patient A's competency hearing about her qualifications as a neuropsychologist and her forensic privileges. Samuelson was reinstated, and NSH was ordered to pay her back pay and benefits, plus interest, from the time of her termination.

Samuelson returned to work at NSH in May 2011. She received a new assignment in the hospital's medical unit. Because the medical unit was not a forensic psychology unit, the assignment hindered Samuelson's ability to become board certified in forensic psychology. One year after being reinstated, Samuelson was reassigned to Program 3. Samuelson was working at NSH when this case went to trial.

Samuelson's Whistleblower Lawsuit

Samuelson filed this lawsuit in November 2011. Her amended verified complaint alleged violations of two separate whistleblower protection statutes. Samuelson alleged a violation of Labor Code section 1102.5 against the Department of State Hospitals. That code section provides, in pertinent part, that "[a]n employer . . . shall not retaliate against an employee for disclosing information . . . to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, . . . if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation[.]" (Lab. Code, § 1102.5, subd. (b).)

Samuelson also alleged a violation of Government Code section 8547.8, subdivision (c) against defendants Jones, White, and Kim. That Government Code section provides, in pertinent part, that "any person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a state employee or applicant for state employment for having made a protected disclosure shall be liable in an action for damages brought against him or her by the injured party." (Gov. Code, § 8547.8, subd. (c).) A "protected disclosure" is defined as, inter alia, "a good faith communication, including a communication based on, or when carrying out, job duties, that discloses or demonstrates an intention to disclose information that may evidence (1) an improper governmental activity[.]" (Gov. Code, § 8547.2, subd. (e).)

A jury trial commenced in January 2014 and lasted approximately five weeks. At the close of evidence and argument, the jury was asked to complete a special verdict form as to each defendant. As pertinent here, the special verdict form for the Department of State Hospitals asked the jury the following question regarding whether Samuelson made a protected disclosure under Labor Code section 1102.5:

"1. Did [Samuelson] disclose to a government agency that: (A) in regard to trial competency evaluations, there was an improper and systematic: (1) failure to apply generally accepted professional standards of care, or (2) failure to use objective assessment methods in assessing patients' competency to stand trial; or (B) there was a coercive environment in Program 5 at NSH, where by use of a peer review process psychologists were compelled to comply with an agenda to improve outcome statistics using a subjective process to find patients competent to stand trial, without regard to the psychologist's independent professional judgment, and without application of objective, standardized, normed, and reliable instruments?"

With regard to whether Samuelson made a protected disclosure under Government Code section 8547.8, the special verdict forms for the three individual defendants asked simply: "Did [Samuelson] make a protected disclosure?" The jury instructions included an instruction on the Government Code definition of "protected disclosure."

On the special verdict forms, the jury answered "yes" to these questions, thus indicating that Samuelson had made a protected disclosure. The jury also answered "yes" to the other questions on each special verdict form addressing the remaining elements of Samuelson's whistleblower causes of action, resulting in a finding of liability in favor of Samuelson against each defendant.

The jury awarded Samuelson $1 million in damages. Of that amount, $695,000 was awarded for "lost income capacity," with $675,000 awarded against the hospital, $10,000 awarded against Dr. Jones, and $5,000 awarded against each of Drs. White and Kim. The jury further answered "yes" that each of the individual defendants acted with malice, oppression, or fraud, but ultimately did not award punitive damages.

Defendants timely appealed from the post-trial judgment.

DISCUSSION

A. *Substantial Evidence Showed that Samuelson Made a Protected Disclosure.*

Defendants argue that the evidence failed to show that Samuelson made a protected disclosure under the whistleblower laws on three separate grounds: Samuelson could not have had a reasonable belief that she was disclosing a legal violation, the information disclosed by Samuelson was publicly-known, and Samuelson's disclosures were not made to a person in a position to remedy the wrongdoing.

Although Samuelson alleged violations of two whistleblower statutes, the parties have focused their arguments about whether Samuelson made a protected disclosure on only one of them—Labor Code section 1102.5, apparently assuming that Samuelson's cause of action under Government Code section 8547.8 rises or falls with the same standards that apply to the alleged Labor Code violation. Accordingly, our analysis will focus on Labor Code section 1102.5 and cases interpreting it.

1. *Standard of Review*

We first address the standard of review applicable to defendants' contention that the evidence did not show that Samuelson made a protected disclosure under the whistleblower statutes.

Defendants assert that our review should be de novo because evidence material to whether Samuelson made a protected disclosure was "undisputed" at trial. Samuelson responds that whether she made a protected disclosure should be reviewed for substantial evidence whether or not the evidence at trial was disputed, and that, contrary to defendants' assertion, the evidence was disputed, and defendants have cherry-picked facts from the record in claiming otherwise. We conclude from our review of the record that defendants provided only a partial summary of the relevant evidence and omitted facts favorable to Samuelson.[4] And we also found instances in which evidence relating to whether Samuelson made a protected disclosure was disputed.[5]

Our review of whether Samuelson made a protected disclosure is for substantial evidence. Whether Samuelson made a protected disclosure was a question for the trier of fact, and "[i]n both jury and nonjury trials, factual findings made by the trier of fact are generally reviewed for substantial evidence." (*Ermoian v. Desert Hosp.* (2007) 152 Cal.App.4th 475, 500-501.) Under this standard, "[o]ur authority begins and ends with a determination as to whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, in support of the judgment." (*Howard v. Owens Corning*

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[4] As the parties challenging the sufficiency the evidence, defendants were obligated to set forth, discuss, and analyze all of the relevant evidence, both favorable and unfavorable. (See California Rules of Court, rule 8.204(a)(2)(C) [an appellant's opening brief shall "[p]rovide a summary of the significant facts. . . ."]; *Doe v. Roman Catholic Archbishop of Cashel & Emly* (2009) 177 Cal.App.4th 209, 218.) Consistently in their opening brief, defendants failed to do so, and instead presented a one-sided recitation of the facts, "an argumentative presentation that not only violates the rules noted above, but also disregards the admonition that [they are] not to 'merely reassert [their] position at . . . trial.' [Citation.]" (*In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1531.) Particularly in their reply brief, defendants recited facts without any record citations, which violates our rules to "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." (Cal. Rules of Court, rule 8.204(a)(1)(C).)

[5] For example, Samuelson testified she told Dr. Hoff that the R-CAI was being used in a way that promoted rote memorization. Dr. Hoff recalled Samuelson complaining about the R-CAI, but denied that Samuelson specifically complained the R-CAI was being used in a way that promoted rote memorization.

(1999) 72 Cal.App.4th 621, 630-631.) "Even in cases where the evidence is undisputed or uncontradicted, if two or more different inferences can reasonably be drawn from the evidence this court is without power to substitute its own inferences or deductions for those of the trier of fact, which must resolve such conflicting inferences in the absence of a rule of law specifying the inference to be drawn." (*Id.* at p. 631.) We review the record in the light most favorable to the judgment to determine whether it is supported by substantial evidence. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571.) " 'Substantial evidence' is 'evidence "of ponderable, legal significance, . . . reasonable in nature, credible, and of solid value." ' " (*People v. JTH Tax, Inc.* (2013) 212 Cal.App.4th 1219, 1243.) "We must accept as true all evidence and all reasonable inferences from the evidence tending to establish the correctness of the [jury's] findings and decision, resolving every conflict in favor of the judgment." (*Ibid.*) "We may not reweigh the evidence." (*Ghilotti Construction Co. v. City of Richmond* (1996) 45 Cal.App.4th 897, 903.) When there is substantial evidence to support the jury's conclusion, "it is of no consequence that the [jury] believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 874, italics omitted.) "Needless to say, a party 'raising a claim of insufficiency of the evidence assumes a "daunting burden" ' [citation] . . . ." (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1188.)

2. *Reasonable Belief of Legal Violation*

Defendants argue that Samuelson did not make a protected disclosure because she could not have reasonably believed she was disclosing a legal violation. Defendants assert that, according to Samuelson's own testimony, she observed just two psychologists administer the R-CAI without asking follow-up questions on a limited number of occasions, and she conceded that she did not observe the entire assessment process and did not know what other tests were performed outside of her observations. Defendants contend that the two psychologists that Samuelson observed, Dr. Dawson and Dr. Paula Astalis, testified that they asked follow-up questions in addition to the standard R-CAI questions, which indicates that Samuelson only saw a small snapshot of the process.

"Most tellingly," argue defendants, "[Samuelson] failed to present *any* evidence showing that alleged misuse of the RCAI in the manner that she observed led to false positives of competency, or that her colleagues committed wrongdoing on any occasion," meaning she could not reasonably believe there was any wrongdoing.

Samuelson disputes defendants' characterization of the evidence, and argues the evidence is sufficient to show that she observed that competency assessments were not being conducted in accordance with the standard of care, and that she had a reasonable basis to believe that the improper competency assessments amounted to illegal conduct.

In order for a disclosure to be protected by Labor Code section 1102.5, a plaintiff must have reasonable cause to believe that the information discloses a legal violation. (Lab. Code, § 1102.5, subd. (b); (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 854 (*Mize-Kurzman*).) A disclosure that encompasses "only the context of *internal personnel matters* involving a supervisor and her employee, rather than the disclosure of a legal violation" is not protected. (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1385.) However, "[d]isclosures of a policy that the employee reasonably believes violates a statute or regulation are protected disclosures, *whether or not the existence of an actual violation or the wisdom of the policy are debatable*." (*Mize-Kurzman, supra,* 202 Cal.App.4th at p. 854.)

The evidence was sufficient to show that Samuelson could reasonably believe she was disclosing a legal violation. The evidence showed that Samuelson observed the R-CAI being administered without follow-up questions by more than just Dr. Dawson and Dr. Astalis; she also observed two other part-time psychologists, as well as rehabilitation therapists and social workers. Samuelson believed that administering the R-CAI without asking follow-up questions violated the standard of care because it allowed patients to rote memorize answers. Samuelson's belief was confirmed by the testimony of her forensic psychology expert at trial, as well as defendants' expert in forensic psychology, who both testified that it was improper for a psychologist to administer the R-CAI without asking follow-up questions.

The basis for Samuelson's concern about competency assessments extended beyond observing how others conducted the assessments. She reviewed letters filed with the trial courts by psychologists who had conducted trial competency assessments and concluded that a patient had been restored to competency. These "court letters" described the assessment instruments used to assess a patient's trial competency. The letters reviewed by Samuelson never listed an assessment method other than the R-CAI, mock trial, and dispositional staffing. In addition, Samuelson was never instructed to ask follow-up questions beyond the written list of questions in the R-CAI. The R-CAI materials provided to Samuelson and other Program 5 psychologists did not mention that follow-up questions should be asked. In sum, the evidence viewed in a light most favorable to Samuelson establishes that she could reasonably believe she was revealing that the R-CAI was not being properly administered.

In their reply brief, defendants make a separate argument that Samuelson could not reasonably believe she was disclosing a legal violation because there are no laws that govern a psychologist's methods for determining whether a defendant is competent to stand trial, and that trial competency is a legal determination made by courts, not clinicians, under the standards set out in Penal Code section 1367 and the United States Supreme Court's opinion in *Dusky v. United States* (1960) 362 U.S. 402 (*Dusky*). Defendants failed to make this argument in their opening brief, and did not explain why the argument is raised for the first time in reply. Accordingly, the argument has been waived. (See *Levin v. Ligon* (2006) 140 Cal.App.4th 1456, 1486; 9 Witkin, Cal. Procedure (5th ed., 2008) Appeal, § 723, p. 790.)

But even if we consider the argument, we would reject it. As we explained, state hospitals such as NSH are directed by the Penal Code to promote a defendant's "speedy restoration to mental competence" if a defendant is found incompetent by a trial court. (Pen. Code, § 1370, subd. (a)(1)(B)(i).) The Penal Code's standard of competency mirrors the federal due process standard for competency established by the United States Supreme Court in *Dusky*, where the high court explained that the test is whether a defendant "has sufficient present ability to consult with his lawyer with a reasonable

degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."[6] (Pen. Code, § 1367, subd. (a).) Samuelson was aware of the *Dusky* standard, and believed that the competency assessments she observed violated it. Under California law if a state hospital determines a patient has regained competency under this standard, the state hospital must file with the court a certification that the patient has regained competency. (Pen. Code, § 1372, subd. (a)(1).) Under this statutory scheme, although a trial court makes the ultimate finding as to competency, a state hospital and its personnel play an integral role in forming that determination. As such, Samuelson could reasonably believe that if NSH personnel were not using the appropriate standard of care in assessing competency, NSH was not fulfilling its obligations for assessing competency as required by law.

3. *Disclosure of Publicly-Known Information*

Defendants also contend that Samuelson's "alleged disclosures also fail as a matter of law because [NSH's] trial-competency assessments are conducted in a manner that is wholly transparent and is statutorily subject to scrutiny by courts, prosecutors, and defense counsel. [Samuelson] presented no evidence that [NSH] was concealing its actions or methods from outsiders. Therefore, [Samuelson's] disclosures amounted to reports of actions that are automatically disclosed, and even challenged by cross-examination in court proceedings." Defendants cite no authority for the argument other than the statutory scheme in the Penal Code for mentally incompetent defendants as we have described it.

We believe defendants' argument lacks merit. Their position amounts to an unpersuasive argument that employees of the Department of State Hospitals are excluded from the protection of whistleblower statutes because competency assessment methods

[6] Our Supreme Court has observed that although the language of Penal Code section 1367 " 'does not match, word for word, that of *Dusky*, ... "[t]o anyone but a hairsplitting semanticist, the two tests are identical." ' [Citations.]" (*People v. Jablonski* (2006) 37 Cal.4th 774, 808.)

they believe are unlawful are part of, and may ultimately be disclosed in, a court proceeding.

Further, although the whistleblower statutes do not protect publicly available information, (*Mize-Kurzman, supra*, 202 Cal.App.4th at p. 858) there was evidence at trial that the court proceedings for determining competency are not as "transparent" as defendants assert. Paul Graves, the deputy district attorney who prosecuted Patient A, and later urged an investigation into Samuelson's testimony, testified that the vast majority of competency matters he worked on were decided strictly on the papers; a hearing was rarely held. Thus, the cross-examination on which defendants' transparency argument rests is not necessarily the rule. Further, defendants represented in their reply brief that the "court letters" written by NSH personnel and addressed to trial courts regarding a patient's competency are confidential, meaning they are not publicly disseminated and are available only to the trial court, prosecutor, and defense attorney. And defendants have not cited any evidence that the specific complaints Samuelson made about the R-CAI had already been publicly disclosed by others before she raised her concerns.

4. *Disclosure to Someone Able to Correct the Wrongdoing*

Last, defendants contend that the evidence failed to show that Samuelson complained about competency assessment procedures to a "non-wrongdoer in a position to remedy the wrong," a position Samuelson contests.

To be protected, a disclosure must be made "to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance." (Lab. Code, § 1102.5, subd. (b).) An employee's report to the employee's supervisor about the supervisor's own wrongdoing is not a "disclosure" and is not protected whistleblowing activity. (*Mize-Kurzman, supra*, 202 Cal.App.4th at p. 859.) In accordance with these principles, the jury was instructed that a report made by an employee is a protected disclosure "so long as the report is made to an agency or person who is not alleged to be the wrongdoer and is in a position to remedy the alleged violation."

Viewed in a light most favorable to the judgment, the evidence showed that Samuelson made her complaints about competency assessment procedures to personnel who were not wrongdoers and who were in a position to remedy the issues she complained of. Samuelson first complained in the fall of 2006 to several people at NSH, including Dr. Anne Hoff, who served as Samuelson's licensure supervisor and proctored her for neuropsychological privileges. Samuelson also raised her complaints in a program meeting in 2006 attended by Ellen Bachman, the director of Program 5, and Dr. Jack Dawson, who proctored Samuelson in 2006 for general psychological privileges. Samuelson continued to raise concerns about competency assessments in 2008 to several others, including Dr. Patricia Tyler, NSH's medical director. She also complained to Dr. Ahmed Haggag, a psychiatrist who also served as NSH's chief of staff. These individuals were not alleged to be wrongdoers, and the jury could reasonably conclude that because they either supervised Samuelson or had high-level roles with NSH, they were in a position to remedy the issues about which Samuelson complained.

B. ***The Trial Court Did Not Prejudicially Err by Allowing Evidence of the Federal Consent Decree***

Defendants next claim that the trial court committed prejudicial error by allowing evidence of the federal consent decree.

Samuelson, to support her claim that she reasonably believed the competency assessment procedures she witnessed were unlawful, alleged that the consent decree had the same force of law as a statute or regulation, and was being violated when NSH personnel conducted improper competency assessments. Prior to trial, defendants moved in limine "to exclude evidence of and any reference to the [federal consent decree] as having any bearing over the selection of appropriate Penal Code section 1370 trial competency assessment methods at [NSH]." They also requested a hearing under Evidence Code section 402, subdivision (b). The trial court denied the motion, stating "I do believe that it is not a preliminary issue, that these are issues for the jury. They will hear, and sounds like you [defendants' counsel] got your expert witnesses ready to testify, that the consent decree didn't dictate particular methods, that the hospital was

meeting those standards, et cetera, and I think it's a jury issue. So I'm denying [the motion]."

The issue arose again, outside the presence of the jury, near the conclusion of trial when the trial court and counsel were discussing how to instruct the jury about interpreting the consent decree. After hearing argument, the court concluded that it did "not believe the consent decree required the hospital to use objective, standardized and normed instruments in assessing the patient's trial competency. There is no evidence to that effect. It's not stated in the consent decree." Referring to the consent decree as a "contract," the court continued: "The remaining issue is, okay, but with the tools they were using, were they performing them in accordance with the professional standards of care. That's another issue and can go to the jury; but in terms of interpreting this contract, I will now rule that there is no ambiguity in the contract especially on the testimony at trial. [¶] The consent decree did not require the hospital to use standardized and normed instruments in assessment of a patient's trial competency."

In accordance with its ruling, the trial court gave the following instruction to the jury: "The consent decree did not require Napa State Hospital to follow any particular trial competency assessment methodology, nor did it require the use of any normed, standardized, or objective assessment instruments."

Defendants argue that the trial court committed prejudicial error by allowing evidence about the consent decree because it "had nothing to do with the facts of this case," and that because the jury heard "extensive evidence" of the consent decree, "the trial court had no way to remedy this error." Samuelson responds that the trial court properly admitted the consent decree because it was "relevant as [Samuelson] thought it applied, with the force of law, to trial competency assessments," and that even if it was error to admit the consent decree, defendants have not shown the error was prejudicial.[7]

[7] Samuelson contends that defendants have waived their argument that the trial court erred in admitting the consent decree in evidence because defendants stipulated to its admission. This argument is without merit because defendants stipulated to admission of the consent decree only after their motion in limine was denied.

Defendants have not shown that any error committed by the trial court in originally denying defendants' motion in limine was prejudicial. (See Cal. Const., art. VI, § 13; Code Civ. Proc., § 475; see Evid. Code, § 353, subd. (b) [error in admitting evidence must result in miscarriage of justice to warrant reversal].) To show a miscarriage of justice, defendants must demonstrate that a "different result would have been probable if the error had not occurred." (*Zhou v. Unisource Worldwide, Inc.* (2007) 157 Cal.App.4th 1471, 1480 (*Zhou*).) They have not done so here. They claim that Samuelson was allowed to "refer constantly" to the consent decree at trial, and that prejudice to defendants was "exacerbated" when Samuelson's counsel questioned NSH's executive director about issues underlying the consent decree. But to support this argument, defendants cite only 16 pages of testimony from the 20-volume, 3,700-page reporter's transcript, and provide no analysis of the cited testimony. Our own review of the cited testimony revealed that it is mostly innocuous; it briefly covered discrete matters addressed in the consent decree, such as psychological assessments and cognitive screenings. The only potentially inflammatory evidence that defendants cite is when Samuelson's attorney, while attempting to refresh the recollection of a witness, read from a document that mentioned a patient suicide at NSH in 2004. But almost immediately after Samuelson's attorney read the document, the trial court admonished the jury that it could not consider the document for the truth of the matters asserted in it. We presume the jury followed this instruction. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 803 (*Cassim*).)

Further, as we discussed, the trial court instructed the jury that the consent decree did not require Napa State Hospital to follow any particular trial competency assessment methodology, or require the use of any normed, standardized, or objective assessment instruments. We presume the jury followed the instruction. (*Cassim, supra*, 33 Cal.4th at p. 803.) And during closing argument, Samuelson's counsel did not present argument that the consent decree required any particular assessment methodology. Instead, counsel argued that Samuelson "could certainly understand" from her review of the United States Department of Justice's complaint leading to the consent decree that "the failure to

comply with the standard of care in trial competency assessments violated the Constitution" and other federal statutes. In sum, defendants have not shown prejudicial error.

In their reply brief, defendants argue that the "perfunctory curative instruction" given by the trial court was inadequate because "the court only informed the jury what the consent judgment did not apply to." Defendants argue that the trial court "*did not* tell the jury that [Samuelson] lacked any objectively reasonable basis to believe that the consent judgment applied to her alleged concerns regarding the R-CAI. The trial court *did not* explain to the jury that the consent judgment, regardless of its meaning, was not a 'law' that could have been violated by DSH-N's trial-competency assessment methods. The trial court *did not* admonish the jury that all of the testimony regarding the consent judgment that had ensued over the last six weeks was completely irrelevant to [Samuelson's] whistleblowing claim and to disregard it."

Defendants failed to make this argument in their opening brief, and did not explain why the argument is raised for the first time in reply. Accordingly, the argument has been waived. (See *Levin v. Ligon, supra,* 140 Cal.App.4th at p. 1486; 9 Witkin, Cal. Procedure, *supra,* § 723, p. 790.) In any event, defendants also forfeited the argument because we have found no indication in the record that defendants requested additional curative instructions. (See *Medical Board of California v. Chiarottino* (2014) 225 Cal.App.4th 623, 632 [arguments not asserted below not considered for first time on appeal].) To the contrary, defendants' counsel conceded during the jury instruction conference that the jury could still consider the consent decree in determining whether Samuelson had a reasonable belief that it required personnel to comply with a professional standard of care when conducting competency assessments, even though it did not require the use of any standardized or normed instruments.

C. *The Trial Court Did Not Prejudicially Err by instructing the Jury on Health and Safety Code section 1316.5*

The Attorney General next argues that it was prejudicial error to give two jury instructions—special instructions 14 and 15—regarding Health and Safety Code section 1316.5 (section 1316.5).

Special instruction 14, which quoted verbatim the first sentence of section 1316.5, subdivision (a)(1), stated: "Each health facility owned and operated by the state offering care or services within the scope of practice of a psychologist shall establish rules and medical staff bylaws that include provisions for medical staff membership and clinical privileges for clinical psychologists within the scope of their licensure as psychologists, subject to the rules and medical staff bylaws governing medical staff membership or privileges, as the facility shall establish." Samuelson requested this instruction because she claimed it showed "the statutory authority behind the bylaws . . . at NSH. This provides the grounds for Plaintiff's argument that violations of the bylaws were, in fact, statutory violations."

Special instruction 15, which quoted section 1316.5, subdivision (a)(2) verbatim, read: "With regard to the practice of psychology in health facilities owned and operated by the state offering care or services within the scope of practice of a psychologist, medical staff status shall include and provide for the right to pursue and practice full clinical privileges for holders of a doctoral degree of psychology within the scope of their respective licensure. These rights and privileges shall be limited or restricted only upon the basis of an individual practitioner's demonstrated competence. Competence shall be determined by health facility rules and medical staff bylaws that are necessary and are applied in good faith, equally and in a nondiscriminatory manner, to all practitioners, regardless of whether they hold an M.D., D.O., D.D.S., D.P.M., or doctoral degree in psychology." Samuelson requested this instruction because it showed she "had the statutory right to pursue and practice full clinical privileges at NSH. This instruction provides the statutory authority for that claim."

Defendants contend that the trial court erred by giving special instructions 14 and 15 because section 1316.5 "had nothing to do with [Samuelson's] complaints about her colleagues' peer-review process or [NSH's] bylaws," and "[h]ad the court refused to

adopt [Samuelson's] erroneous interpretation of section 1316.5, [Samuelson] would not have been able to include it as a jury instruction, and she would have been unable to rely on that statute to show an essential element of her whistleblower claim, which is that she reported conduct that violated a law." Samuelson responds that it was not error for the trial court to read the two instructions because, under *Baber v. Napa State Hospital* (1989) 209 Cal.App.3d 213, a violation of medical staff bylaws is a violation of a state statute. She further argues that even if the trial court erred by giving special instructions 14 and 15, we should not reverse the judgment because defendants have not demonstrated a miscarriage of justice.

We need not reach the merits of defendants' argument because we conclude that even if the instructions were erroneous, defendants have not shown a miscarriage of justice.

As the parties challenging the jury instructions, defendants must show that any error resulted in a miscarriage of justice (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475), meaning they must demonstrate that a "different result would have been probable if the error had not occurred." (*Zhou, supra,* 157 Cal.App.4th at p. 1480.) Defendants have not made that showing. They only make the bare assertion that giving the instructions was prejudicial "because the challenged instructions were presented to the jury as a potential basis for whistleblower liability," and that "the jury was confused and misled into finding that [Samuelson] had reasonably believed she violated a law—Section 1316.5—when she reported violations of hospital bylaws in the peer-review process." They have pointed to nothing in the record, such as witness testimony or closing argument, indicating a reasonable probability that the jury would have reached a different verdict but for the two instructions. (See *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 983 [erroneous instructions in civil cases are not inherently prejudicial, and appealing party must show probability that instruction affected the verdict]; *Lundy v. Ford Motor Co.* (2001) 87 Cal.App.4th 472, 480 [incorrect instruction on term "substantially impaired" in Lemon Law case was prejudicial when record showed there was conflicting evidence on whether vehicle was substantially impaired,

and when plaintiff's closing argument relied on incorrect definition of "substantial impairment"].) Defendants' conclusory arguments that the error was prejudicial are insufficient to reverse the judgment. (See *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106 ["Because of the need to consider the particulars of the given case, rather than the type of error, the appellant bears the duty of spelling out in his brief exactly how the error caused a miscarriage of justice"].)

Defendants argue further that had the two special instructions on section 1316.5 not been given, "there would have been no basis for a verdict against [defendants]." But special instructions 14 and 15 applied only to Samuelson's theory that she disclosed the peer review process was being used in violation of NSH's bylaws. The thrust of Samuelson's case, however, was based on a separate theory—her disclosure that NSH personnel were not properly conducting competency assessments. Samuelson's counsel focused on this latter theory during closing argument, and gave only short shrift to special instructions 14 and 15. Accordingly, even if it was error to give special instructions 14 and 15, defendants have not shown that the error affected the jury's verdict.

D. *The Trial Court Did Not Err by Allowing Closing Argument on Violation of the Dusky Standard*

Defendants contend that the trial court erred by allowing Samuelson's counsel to argue to the jury that the competency assessments viewed by Samuelson violated the United States Constitution.

When Samuelson's counsel was arguing to the jury why Samuelson reasonably believed she was disclosing a legal violation, he stated: "If you are not conducting trial competency assessments properly, you are not assuring that the patients are, in fact, in compliance with the Dusky Standard when you certify them as competent. Now, that's a violation of the Dusky Standard, and that's a violation of the Constitution on which that standard is based, and the Constitution is the ultimate federal statute. Violation of the Constitution is a violation of a federal statute." Defendants' counsel objected, contending that it was "an inaccurate and misleading statement of the law" because competency determinations at NSH are only the first step in determining whether a patient is

competent to stand trial; ultimately, "the judge is the gateway to making [the competency] determination, not Napa State Hospital." Defendants' counsel argued that *Dusky* is thus a "measuring tool" used at NSH, but cannot be "violated" by NSH personnel since judges make the ultimate competency determination.

The trial court overruled defendants' objection and permitted the argument, stating: "The question is whether systematic certification of patients as competent to stand trial when they in fact are incompetent is a violation of due process rights under the U.S. Constitution, and I do believe that it can rise to that level. [¶] The court certainly is the ultimate gatekeeper, as the defense calls it, but if the court is consistently, and as a pattern of conduct, getting reports that are incorrectly certifying patients, that can be a violation of the patient's constitutional rights[.]"

Defendants now argue that the trial court erred in allowing counsel's argument about the *Dusky* standard. We disagree. As we explained, although a trial court makes the final decision that a patient is restored to competency, state hospital personnel play an integral role in informing the court's decision by testing a patient for competency, and then providing a certification to the court if they believe a patient has regained competency. The trial court, in turn, reviews the information provided by the state hospital and makes a competency determination applying the *Dusky* standard. If, as plaintiff's counsel argued, NSH personnel were certifying to the trial court that patients were competent to stand trial without properly assessing their competency, a patient's constitutional due process rights could potentially be implicated.

Moreover, even if allowing counsel's argument was error, the error was not prejudicial. The underlying issue was not whether personnel were in fact committing legal violations, but whether Samuelson could reasonably believe violations were being committed. (*Mize-Kurzman, supra*, 202 Cal.App.4th at p. 854 ["[d]isclosures of a policy that the employee reasonably believes violates a statute or regulation are protected disclosures, *whether or not the existence of an actual violation or the wisdom of the policy are debatable*"].) As we explained, there was sufficient evidence that Samuelson could have a reasonable belief of a legal violation.

E. *The Damages Award for Lost Income Capacity is Not Supported by Substantial Evidence.*

Defendants challenge Samuelson's damages award for $695,000 in "lost income capacity" on the grounds that her reinstatement at NSH precluded her from recovering lost income capacity damages at all, and, in any event, the evidence was too speculative and uncertain to support these damages.

As we have discussed, Samuelson was successful in challenging her termination to the SPB, and was reinstated to NSH with back pay, interest, and benefits. Thus, she could not and did not claim damages at trial for lost salary or benefits from NSH. She did seek as economic damages "lost income capacity," which was intended to compensate her for the difference between her salary at NSH and the additional much greater sums she claims she could have earned from a private psychology practice that she had hoped to open at a future date but was unable to achieve as a result of the retaliation against her.

The evidence to support this theory of damages was presented through the testimony of Samuelson and a retained accountant witness. Samuelson testified that as a result of being retaliated against, her reputation was "destroyed" and she became "very depressed." Samuelson testified that this caused her to suffer a permanent loss of "drive and energy," which prevented her from pursuing her plan to obtain necessary professional licenses, leave Napa State Hospital, and open a successful private psychology practice. Had she been in private practice, Samuelson believed there were "quite a few different things I could do," such as testifying as an expert witness, conducting pediatric and adult neuropsychological assessments, and treating soldiers with post traumatic stress disorder. She testified that her friends thought she would be good at being a "job coach for executives" and a "counselor for families who have been overseas."

Samuelson believed she would have succeeded in a private practice based on a past experience at a multi-office private practice that she worked at after completing an internship but before joining NSH. The business owner of the practice was a "very savvy

businessman." Samuelson believed that once she transitioned full-time to her own private practice, she could bill 200 hours per month at an average rate of $200 an hour. Samuelson acknowledged this was a high number of hours, but she already worked long hours at NSH and had observed another psychologist bill a similar number of hours in private practice. Samuelson estimated her costs would be $1,900 per month for office space, and a "couple hundred" dollars more for advertising. She would also incur costs for supplies and conducting tests.

Samuelson's accounting expert, Randy Sugarman, testified that he calculated the income Samuelson lost by not opening a private practice based on the assumptions provided by Samuelson regarding her original plan to open a private practice. He assumed Samuelson would get her psychology license in December 2008; that she would open her private practice on a part-time basis in January of 2009; that her billing rate would be $200 an hour; that her annual expenses would be $23,000 a year; that by July 2011, Samuelson would be billing 200 hours per month; and that she would continue to work in private practice until retirement in November 2028. Applying these assumptions, Sugarman calculated Samuelson's damages from January of 2009 through December 2013 (shortly before trial) for lost income to be $1,334,043, plus interest. Sugarman calculated Samuelson's damages for future lost income from 2014 onward to be approximately $5 million. However, Sugarman reduced the amount of future lost income to $1,357,450 by applying a large discount rate to account for "the nature of the practice and the risks involved." In total, Sugarman concluded that Samuelson was entitled to $2,882,000 for lost income.

The jury was instructed that Samuelson could recover two types of economic damages: "Lost past and future income capacity" and "Travel, storage, and other costs related to her relocation after termination." As to lost income capacity, the jury was instructed that "[t]o recover damages for past lost earning capacity, Dr. Samuelson must prove the amount of earning capacity that she has lost to date. [¶] To recover damages for future lost earning capacity, plaintiff must prove the amount of income and earning capacity she will be reasonably certain to lose in the future as a result of the injury." In

addition to the economic damages, the jury was also instructed that Samuelson could recover non-economic damages for "[p]hysical pain, mental suffering, and emotional distress."

The jury awarded Samuelson $1 million in total damages. The bulk of this amount—$695,000—was for lost income capacity; the jury was not asked to differentiate between past and future. The jury also awarded Samuelson $3,222 for storage and relocation costs. The remainder of the damages awarded—approximately $300,000—was for non-economic damages.[8]

Samuelson argues that defendants waived any challenge to the award of damages for lost income capacity by failing to move for a new trial on the ground of excessive damages. "A claim of excessive or inadequate damages cannot be raised on appeal unless appellant first urged the error in a timely motion for new trial [(Code Civ. Proc., § 657, subd. (5))]. The theory is that trial courts are in a better position than appellate courts to resolve disputes over the proper amount of damages." (*Greenwich, supra,* 190 Cal.App.4th at p. 759.) But this rule does not preclude a party from arguing, as defendants do here, that lost income capacity is an improper measure of damages, or that "the evidence was sufficient to support the award of lost profits in *any* amount." (*Ibid.*) This is because whether lost income capacity is a proper measure of damages, or whether substantial evidence supports damages for lost income capacity, does not turn on issues that the trial court is in a superior position to resolve, such as the credibility of witnesses or factual disputes. Accordingly, we find that defendants have not waived their challenge of damages awarded for lost income capacity.

On the merits, defendants' first argument is that loss of income capacity is an improper measure of damages as a matter of law because Samuelson was reinstated to her prior position at NSH. According to defendants, loss of income capacity is a form of damages available only in cases where a plaintiff is not (or could not be) reinstated to her

[8] On appeal, defendants do not challenge the economic damages awarded for storage and relocation costs, or the non-economic damages.

position. It is true that damages for "front pay" cannot be awarded if a plaintiff is reinstated. (See *Cloud v. Casey* (1999) 76 Cal.App.4th 895; *Traxler v. Multnomah County* (9th Cir. 2010) 596 F.3d 1007, 1012.) Defendants have cited no authority, and we are aware of none, stating that loss of income capacity, a different measure of damages, cannot be awarded after a plaintiff is reinstated. But we do not need to reach this issue because even if lost income capacity is a proper measure of damages, the evidence was insufficient to support the award.

Defendants argue the evidence is insufficient because it was based on Samuelson's own "speculative and self-serving projections" of what she might earn, and because Sugarman was not a vocational expert, was unqualified to testify about the psychology profession, and merely relied on Samuelson's unfounded assumptions.

For any measure of damages, "it is fundamental that 'damages which are speculative, remote, imaginary, contingent, or merely possible cannot serve as a legal basis for recovery. [Citations.]' " (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 989.) Consistent with this basic principle, the trial court instructed the jury that it could not "speculate or guess" in awarding damages. We are aware of no case in which a court has analyzed whether the evidence was sufficient to support lost income capacity damages in a case such as this one, where the claim is for damages from a private practice that a plaintiff never opened on account of alleged harm from being retaliated against. We look to guidance in similar contexts.

In breach of contract cases, "lost anticipated profits for an unestablished business whose operation is prevented or interrupted are generally not recoverable because their occurrence is uncertain, contingent and speculative. Nevertheless, they may be recovered ' "where the evidence makes reasonably certain their occurrence and extent." [Citations.]' " (*Parlour Enterprises, Inc. v. Kirin Group, Inc.* (2007) 152 Cal.App.4th 281, 288 (*Parlour*).) In *Parlour*, a jury awarded a small restaurant business, Farrell's, a lost profit award of several million dollars based on breach of a franchise agreement for three restaurants that Farrell's had specific plans to open but were never established. (*Id.* at p. 287-288.) The appellate court reversed, finding that the claim of lost profits was

based on expert testimony that was too speculative and uncertain. (*Id.* at pp. 288–289.) The expert testimony was not based on actual operations of the restaurant business but instead based on Farrell's own assumptions. (*Id.* at p. 289.) Moreover, the expert provided only a "cursory description" of comparable businesses he used as a basis to calculate lost profits, which was insufficient to establish that the other businesses were sufficiently similar to Farrell's unopened restaurants. (*Id.* at p. 290.)

Similarly, in personal injury cases, plaintiffs seeking to recover lost earning capacity damages because their injuries prevented them from obtaining a higher-paying job in the future must present evidence that their prospects of job advancement are realistic and not speculative. (Haning et al., Cal. Practice Guide: Personal Injury (The Rutter Group 2015) ¶¶ 3:126, 3:130.) Illustrative of this point is *Pannu v. Land Rover North America, Inc*. (2011) 191 Cal.App.4th 1298. There, a trial court awarded over $21 million in damages (including over $11 million in economic damages) to a plaintiff who sued an automaker for personal injuries after his sport utility vehicle rolled over. (*Id.* at pp. 1302, 1309.) At the time of the accident, the plaintiff owned two 7–Eleven stores and two Subway stores that he and his wife personally managed, and also managed two 7–Eleven stores owned by his parents. (*Id.* at p. 1303.) On appeal, the automaker argued that "the court erred as a matter of law in accepting evidence of the anticipated lost profits of [plaintiff's] businesses, rather than the value of his services to those businesses." (*Id.* at p. 1322.) The appellate court disagreed, stating: "there was ample evidence of [plaintiff's] entrepreneurial skills, his work ethic and his consistent success in growing his businesses. In addition to simply managing the various stores (with assistance from his wife), he participated in franchise and trade associations in an effort to expand his opportunities. He had accumulated four stores (two Subways and two 7–Elevens) at the time of his injury and had recently been approved to purchase a third 7–Eleven. He had the experience and motivation to assess employee performance, to prevent malfeasance and to maximize growth. His injuries deprived him of far more than his ability to earn a manager's salary; there was thus ample evidence to support the trial court's award of economic damages." (*Id.* at p. 1322-1323.)

We conclude that the evidentiary showing required in those cases applies here, as well, because Samuelson seeks to be compensated for a similar loss—the loss of earnings from a prospective but unestablished business. As such, Samuelson's damages for her lost income capacity resulting from not being able to open her private practice are recoverable only if " ' "the evidence makes reasonably certain their occurrence and extent." [Citations.]' " (*Parlour, supra*, 152 Cal.App.4th at p. 288.)

Here, the evidence failed to show damages for lost income capacity with the requisite certainty on many levels. This is because there was insufficient evidence that Samuelson was capable of taking the steps necessary to open a private practice, attract and retain business, manage the business, and succeed at it. Unlike the plaintiff in *Pannu*, who had a successful history of owning and operating his own franchises, Samuelson had no experience owning and operating a private practice on her own. There was no evidence that she had ever taken steps to open her practice, or that she would have successfully obtained the professional licenses that were prerequisites to operate her practice. Instead, the evidence of her past experience in private practice was her scant testimony that she worked at a multi-office practice earlier in her career where she "learned the business of private practice." On the record before us, the evidence is not clear as to what she did there, or whether it was at all similar to the private practice she had once intended to open. Even if there had been sufficient evidence showing that Samuelson could open her own practice, the evidence was insufficient to support her assertion that she would be able to bill $200 an hour for 50 hours a week, year in and year out.[9] There was no evidence as to how many hours are typically billed by psychologists

[9] On appeal, the only evidence Samuelson cites regarding billing rates of psychologists is from Dr. Alex Kettner, who was called as an adverse witness by Samuelson to testify about his role on an investigative subcommittee during Samuelson's first peer review proceeding. During the examination by defense counsel, Dr. Kettner testified that he was currently working in private practice and billed $250 per hour. But nothing linked Dr. Kettner's testimony to Samuelson's plans. Dr. Kettner evaluated workers' compensation claimants, which was different from the type of practice Samuelson aspired to have, and Samuelson provided no evidence that the market rates for what Dr. Kettner did and what she wanted to do were similar. In addition, Dr. Kettner

in private practice, no evidence about the market for psychologists in the area where she wished to practice, and no evidence whether the nature of the work she wanted to do would bear the hourly rate that she envisioned charging.[10]

Sugarman's expert testimony, when considered with Samuelson's testimony, is insufficient to support the damages awarded for lost income capacity. The trial court permitted Sugarman to testify as a "mathematician" who "is simply crunching numbers that have been provided by Samuelson."[11] As such, Sugarman's arithmetic calculations which were the foundation of his opinion about Samuelson's lost income capacity were

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testified that he billed only 20 to 30 hours per week, which does not support Samuelson's claim that she would bill 50 hours a week.

[10] Recently in *Licudine v. Cedars-Sinai Medical Center* (2016) 2016 WL 5462099, a medical malpractice case in which the plaintiff, an aspiring law student, sought damages for the loss of future earning capacity as an attorney, the trial court granted the defendants' motions for a new trial and judgment notwithstanding the verdict because the award was "speculative and excessive." (*Id.* at pp. *2-3.) The appellate court affirmed, explaining that a jury "must fix a plaintiff's future earning capacity based on what it is 'reasonably probable' she could have earned." (*Id.* at p. *1.) Applying this standard, the court explained that the plaintiff "did not introduce evidence establishing a reasonable probability that she could have become qualified and fitted to earn a lawyer's salary. Absent from the record is any evidence of her likelihood of graduating from [law school], her likelihood of passing the Bar, or her likelihood of obtaining a job as a lawyer. Plaintiff also adduced no evidence as to what lawyers earn." (*Id.* at p. *9.)

[11] Samuelson argues that defendants cannot challenge Sugarman's testimony on appeal because defendants stipulated to allowing his testimony at trial. This is not accurate or persuasive. Defendants' counsel had objected to Sugarman's testimony, explaining that defendants were "not objecting to Mr. Sugarman's number crunches" but instead to "the basis of which he accepted the assumptions of Samuelson." The court appeared to agree with defendants' position: "I am going to allow Mr. Sugarman to testify. It appears to me that he's really testifying more as a mathematician. He is simply crunching numbers that have been provided by Samuelson." When assured of the limits of Sugarman's testimony, defendants' counsel stated that "[i]f he limits himself to that testimony, that's fine." Sugarman did limit himself to "number crunch[ing]" on direct examination, but on cross-examination, defendants' counsel asked Sugarman whether he thought Samuelson's assumptions were reasonable. Although defendants may have thus waived their ability to argue that Sugarman should not have been permitted to opine about the reasonableness of Samuelson's assumptions, they are not precluded from arguing that his testimony was insufficient to support the damages award.

only as good as Samuelson's assumptions about her private practice, which were speculative and uncertain. Sugarman testified that he believed Samuelson's assumptions were reasonable based on his 45 years of practice when he "dealt with a lot of medical professionals." But Sugarman admitted he was not a vocational expert, and had conducted no market surveys of psychologists in private practice in the Napa area. At best, Sugarman provided the same type of "cursory description" of the industry that the expert in *Parlour* used to calculate lost profits, which was insufficient to support an award for lost profits damages. (*Parlour, supra,* 152 Cal.App.4th at p. 290.) For these reasons, even when we view Sugarman's opinion in a light most favorable to Samuelson, it is insufficient to support the damages awarded for lost income capacity because it is based on " ' " 'speculation and hypothetical situations' " ' " and lacks a " ' " 'substantial and sufficient factual basis.' " ' " (*Parlour, supra,* 152 Cal.App.4th at p. 288.)

DISPOSITION

The judgment is modified by reducing the economic damages awarded against defendant Department of State Hospitals by $675,000; by reducing the economic damages awarded against defendant Jones by $10,000; by reducing the economic damages awarded against defendant White by $5,000, and by reducing the economic damages award against defendant Kim by $5,000. In all other respects the judgment is affirmed.[12] The parties shall bear their own costs on appeal.

[12] In a separate opinion filed today in *Samuelson v. Department of State Hospitals, et al.* (A143149), we address defendants' separate appeal from the post-trial award of attorney fees.

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Miller, J.

We concur:

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Kline, P.J.

_____
Stewart, J.

A141659, *Samuelson v. Department of State Hospitals, et al.*